IN THE
SUPREME COURT OF MISSOURI

No. SC85208

In the Interest of M.D.R.,

Lisa Williams, Appellant,

v.

Audrain County Juvenile Office, et al, Respondents.

From the Circuit Court of Audrain County, Missouri
Juvenile Division, the Honorable Roy L. Richter

Respondent Attorney General's Brief

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Jurisdictional Statement

This appeal arises out of a judgment terminating the appellant's parental rights. The appellant invokes this Court's jurisdiction by challenging the constitutionality of a narrow statutory provision, §211.447.2(1), RSMo (2000). But the judgment does not stand or fall on the constitutionality of this portion of the statute.

The juvenile court ordered termination on multiple statutory grounds. LF 30-36; App. A2 - A11. The Missouri appellate courts – including this Court – have routinely held that the satisfaction of one statutory ground for termination is sufficient to terminate parental rights, if termination is in the child's best interests. Thus, in cases in which juvenile courts have ordered termination on multiple grounds, reviewing courts have declined to review all of the grounds for termination, where the evidence is sufficient to support one of them. ***In the Interest of E.L.B.,*** **103 S.W.3d 774, 776 (Mo. banc 2003)(Court affirmed on §211.447.4(1)(b) ground; other grounds included §211.447.2(1), which mother argued was unconstitutional and Court did not address);** ***In the Interest of K.J.K.,*** **108 S.W.3d 62, 67 (Mo. App. SD 2003);** ***In the Interest of B.S.W,*** **108 S.W.3d 36, 43 (Mo. App. SD 2003);** ***In the Interest of A.S.O.,*** **52 S.W.3d 59, 64 (Mo. App. WD 2001); and** ***In the Interest of V.M.O.,*** **997 S.W.2d 388, 391 (Mo. App. WD 1999).**

Only a real and substantial, not a merely colorable, constitutional issue deprives the Court of Appeals of jurisdiction. ***See Lewis v. Department of Social Services,*** **61**

S.W.3d 248, 253 (Mo. App. W.D. 2001). A colorable constitutional issue is one that, after a preliminary inquiry, is "plainly without merit and a mere pretense." *Id*. The instant constitutional challenge is merely colorable. Because "the case can be fully determined without reaching" the constitutional question, *Kenney v. Wal-Mart Stores, Inc*., 100 S.W.3d 809 Mo. (banc 2003)(quotations and citations omitted), the Court should decline to do so as it did in *E.L.B.*, and should transfer the case to the Court of Appeals.

Statement of Facts

Lisa Williams challenged the constitutionality of §211.447.2(1), in the proceedings below for termination of her parental rights to one of her children. LF 2-3. She notified the Attorney General, who participated in this case pursuant to §527.110, RSMo (2000)[1] and Rule 87.04. *Id*.

The statement of facts contained in the brief of the Respondent Audrain County Juvenile Officer sets out the relevant case history, including events leading to the termination of Ms. Williams' parental rights. Juvenile Officer Brief, pp. 10-20. The Attorney General adopts that statement of facts by reference. Pertinent to the constitutional issue, we add the following statement of facts concerning the course of the proceedings in the juvenile court.

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[1] **All statutory references are to the Revised Statutes of Missouri (2000).**

The Audrain County Juvenile officer initiated the proceedings for termination of Lisa Williams' parental rights to her child, Marlin Robinson, pursuant to §211.447.[2] The statute contains subsections that direct or authorize a juvenile officer to file such a petition. §211.447.2 ("[A] petition to terminate the parental rights of a child's parents shall be filed by the juvenile officer .... when:...") and §211.447.4 ("The juvenile officer ... may file a petition to terminate the parental rights of the child's parent when..."). Both subsections also delimit criteria for filing. *Id.*

The juvenile officer included these statutory criteria in paragraph 6 of the petition:

> 1. Child in foster care for at least 15 of the most recent 22 months.
>
> 1. Child abandoned for period of six months and longer and, without good cause, left without any provision for parental support, arrangements to visit, or to communicate with child, although able to do so.

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[2] **The juvenile officer also sought to terminate the parental rights of the putative father, Marlin Matthew Robinson (Count II) and the unknown biological father (Count III). LF 59, 62. The juvenile court's docket reflects an entry on January 24, 2003, wherein the court found that "father has not cooperated with appointed counsel" and granted counsel leave to withdraw. LF 2. Father is not represented on appeal and has not filed a brief in this Court.**

2. Child abused or neglected as determined by juvenile court on November 21, 2000, case no. JU1-00-38J.[3]

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[3] **Williams gave birth to the child while she was in prison, and consented to his custody in the Division of Family Services, triggering §211.031 (exclusive jurisdiction of juvenile court) and the filing of the petition in case no. JU1-00-38J. Exhibit A (permanency review hearing judgment). Judge Richter presided over that case, as well as the termination proceeding that is at issue in this appeal.** ***See***

§211.452.1 (petition for termination shall be filed in juvenile court that has prior jurisdiction over child, if such prior jurisdiction exists). The court entered a judgment in the protective custody case on September 11, 2001, ordering that the division was released from making reasonable efforts to return the child to the parents, and ordering that proceedings for termination be initiated. Exhibit A, pp. 1 and 3. *See* §211.183 (division may discontinue making reasonable efforts, when ordered). Though §211.261 provides a right of appeal from such a judgment, the record does not reflect that Williams appealed it.

*****

G. Mother repeatedly and continuously failed, although physically and financially able, to provide child with adequate food, clothing, shelter and other care and control necessary for child's physical, mental and emotional health and development.

H. Child under jurisdiction of juvenile court for over one year, conditions leading to assumption of jurisdiction still persist, conditions of potentially harmful nature continue to exist, little likelihood that those conditions will be remedied at an early date so that child can be returned to mother in near future, continuation of mother-child relationship greatly diminishes child's prospects for early integration into stable and permanent home.

I. Missouri Division of Family Services and mother entered into appropriate social service plans, but mother failed to make progress.

*****

N. Mother unfit to be a party to the mother and child relationship because mother's parental rights to other children were involuntarily terminated.

*****

LF 58-59. The juvenile officer subsequently filed an amended petition, with leave, on January 10, 2003. LF 37-44. It was substantially similar to the original.

The court held an evidentiary hearing on January 24, 2003. The juvenile officer put on four witnesses: Tabitha Blackburn, Division of Child Support Enforcement, Tr. 18; Bruce McKinnon, Chief Juvenile Officer for Audrain County, Tr. 24; Dave Jennings, parole officer for the putative father, Marlin

Matthew Robinson, Tr. 44-45; Lori Masek, social worker for the Division of Family Services, Audrain County office, Tr. 51; and Barbara Pelton, social worker for the Division of Family Services, City of St. Louis office, Tr. 155.

The mother was present in court, Tr. 2, but did not testify or offer any other witness testimony, Tr. 191.

The court granted the petition for termination of parental rights. LF 30. The court noted in its judgment that while the mother argued the statute "could," "may," or "possibly" be applied in an arbitrary way, she "[made] no claim that the Section has been applied arbitrarily as to her, or in any other specific case." *Id.* It therefore denied the mother's constitutional challenge. *Id*.

The court then "turn[ed] to the evidence," applying "the requirements of section 211.447." LF 30. The court set out in italics the statutory criteria, though not identified by citation, and immediately after each criteria, set out its corresponding evidentiary findings. LF 30-36. The five grounds for termination were §211.447.2(1) (15 out of 22 months in foster care); §211.447.2(2)(b) or §211.447.4(1)(b) (abandonment); §211.447.4(2) (child adjudicated abused or neglected); §211.447.4(3) (child under juvenile court jurisdiction for one year, little likelihood that conditions will be remedied in near future); and §211.447.4(6) (parent presumed unfit where rights to one or more other children have been terminated in past three years). The court concluded "that the best interests of this child requires that the parental rights of the mother, alleged father and unknown father be terminated[.]" LF 36. For this Court's convenience, we have outlined these portions of the judgment in table form, and added the statutory citations. The table is contained in the Appendix to this brief, beginning at A-1.

The mother's appeal followed. LF 3.

Argument

Missouri law does not permit, nor mandate, termination of parental rights upon the mere demonstration of the existence of the 15 out of 22 months criteria contained in § 211.447.2(1), RSMo. The statutory scheme affords due process. [responds to Appellant's Point I]

This Court should follow the lead of the Indiana, Nebraska and Oklahoma courts, and apply the rational basis test to Missouri's 15-out-of-22-months statute. But even under strict scrutiny, Missouri's statute is constitutional. Missouri has a compelling state interest in promoting adoptions of children suspended in foster care. Moreover, Missouri's statute is narrowly drawn to make effective that interest because the statute merely provides a guideline for the time given to parents to rehabilitate themselves. Termination is not compelled, but remains permissive upon a showing that it is in the child's best interests.

1. Standard of review

A reviewing court affirms a judgment terminating parental rights unless the statutory ground for termination is unsupported by substantial evidence, is against the weight of the evidence, or erroneously declares or applies the law. *In re. K.C.M.*, 85 S.W.3d 682, 689 (Mo. App. WD 2002). Due deference is given the trial court's assessment of witness credibility. *In the Interest of K.J.K.*, 108 S.W.3d 62, 66-67 (Mo. App. SD 2003)(and citation therein). The facts and the reasonable inferences therefrom are reviewed in the light most favorable to the trial court's order. *Id*. But statutory and constitutional interpretations are issues of law that this Court reviews *de novo. Barker v. Barker*, 98 S.W.3d 532, 534 (Mo. banc 2003) and *Farmer v. Kinder*, 89 S.W.3d 447, 449 (Mo. banc 2002).

A Missouri statute is presumed constitutional unless the challenging party carries the burden of proving that the statute "clearly and undoubtedly" violates some constitution provision and "palpably affronts some fundamental law embodied in the constitution." *Blakely v. Blakely*, 83 S.W.3d 537, 540–41 (Mo. banc 2002) (and citations therein). Therefore, where feasible, the statute will be interpreted consistently with the constitution, with all doubts resolved in favor of constitutionality. *Blakely, supra*. This device of statutory construction includes narrowly interpreting statutes so as to keep them within constitutional limits. *See Blakely*, at 544 n.4 (approving courts' practice of "carefully and narrowly" interpreting a statute creating grandparents' visitation rights, so as to avoid constitutional pitfalls associated with a "literal and expansive" interpretation). It is the party who brings a constitutional challenge – in this case, the mother – who bears the burden to prove the statute is unconstitutional. *Id.* She cannot meet that burden.

2. Missouri's statutory scheme contains standards for filing and for termination, but even then, termination is at most permissive

Missouri law directs or authorizes a juvenile officer or the Division of Family Services to file a petition for the termination of parental rights, under limited circumstances set out in §211.447, such as: the child has been in foster care for 15 of the last 22 months, §211.447.2(1); the child has been abandoned for a period of six months and longer, without any provision for parental support, arrangements to visit, or to communicate with parent, §211.447.4(1)(b); the child has been abused or neglected, §211.447.4(2); or the child has been under jurisdiction of the juvenile court for over one year, and the conditions leading to the assumption of jurisdiction still persist, §211.447.4(3).

But the petition merely opens the door. Section 211.447 also entails a "two-step procedure for terminating parental rights." *In re K.C.M.*, 85 S.W.3d 682, 690 (Mo. App. WD 2002). First, the state must prove – "by clear, cogent, and convincing evidence" – that statutory grounds exist for termination. *K.C.M.*, at 690; *In the Interest of A.M.C.,* 983 S.W.2d 635, 637 (Mo. App. SD 1999). If so, the court must then determine whether termination is in the best interests of the child. *Id*. *See also In re. M.D.*, 70 S.W.3d 579, 584 (Mo. App. SD 2002)(trial court cannot address best interests unless it first finds statutory grounds for termination).

The statutory matrix contains more detail. Section 211.447.5 directs the juvenile court to determine whether statutory grounds for termination exist "pursuant to subsection 2, 3 or 4 of this section." Those subsections variously require a juvenile court to make findings about parental fitness. For example, §211.447.4(2)(a-d) – an abuse or neglect ground for termination – directs that the juvenile court "shall consider and make findings on" the listed "conditions or acts of the parent," including a mental condition that prevents the parent from providing the necessary care, custody and control; a chemical dependency; a severe act or recurrent acts of physical, emotional or sexual abuse; and failure to provide necessities, including food, clothing, shelter and education. Section 211.447.4(3)(a-d) – a one-year juvenile court custody ground for termination – directs that the juvenile court "shall consider and make findings on" a similar list of conditions.

Section 211.447.6 (1-7), sometimes referred to as "best interests" factors, *In the Interest of B.S.W.*, 108 S.W.3d 36, 44 (Mo. App. SD 2003), directs the juvenile court to "evaluate and make findings" on a list of factors, "when appropriate and applicable to the case," including emotional ties to the birth parent; the nature and extent of parental visitation and contact; financial support of child while child is in an agency's custody; whether additional services are likely to bring about lasting parental adjustment, within an ascertainable period of time; parent's disinterest in or lack of commitment to the child; conviction of a felony offense that will deprive the child of a stable home for a period of years (although providing that incarceration is not, alone, sufficient to terminate); and deliberate acts of the parent or another person known to the parent, that subject the child to a substantial risk of harm.

As a practical matter, these statutory requirements favor parents: reviewing courts require "strict and literal compliance." *In the Interest of R.L.H.*, 639 S.W.2d 241, 241-242 (Mo. App. SD 1982). *See also In the Interest of K.C.M.*, 85 S.W.3d at 696 (failure to make findings; judgment of termination reversed, case remanded); *In the Interest of A.S.O.*, 52 S.W.3d 59, 64 (Mo. App. WD 2001)(appellate court refused to consider argument that termination could be upheld on statutory ground not pleaded in petition); *In the Interest of T.A.S.*, 32 S.W.3d 804, 811 (Mo. App. WD 2000)(insufficient findings, reversed and remanded); and *In the Interest of A.M.C.*, 983 S.W.2d 635, 638 (Mo. App. SD 1999)(insufficient findings, reversed and remanded).

Even at the point of decision in the juvenile court proceeding, the statutory scheme remains permissive, favoring the parent, for a juvenile court is never *required* to terminate – it "*may* terminate[.]" §211.447.5 (emphasis added).

In short, §211.447 sets out standards that guide the state as to when it should file a petition, and guide a juvenile court in examining parental fitness and the best interests of the child. Courts and, generally, parties, prefer to rely on standards, rather than free-ranging discretion. *E.g.*, *Blakely*, 83 S.W.3d at 545 (noting with approval that Missouri grandparent visitation statute did not leave the best interests issue to the "unfettered discretion of the trial judge"). This preference should hold particularly true here, where the standards weigh in a parent's favor and against termination, both as written and as applied – the standards neither establish nor permit irrebutable presumptions, whether at the petition stage, or in the two-step proof stage, or in the decision-making stage, that require a juvenile court to terminate parental rights, whether on any single statutory ground, or at all.

III. Missouri's statutory scheme comports with due process

Williams does not cite any authority for the proposition that strict scrutiny applies to her constitutional challenge. She does concede that Missouri courts have traditionally balanced the competing interests in the juvenile arena. Appellant's Opening Brief, p. 38. We agree. And because parental rights must be balanced with the rights of children and of the state, the standard to be applied in determining the constitutionality of statutes affecting those rights must be determined on a case-by-case basis. *See Blakely v. Blakely*, 83 S.W.3d 537, 546 (Mo. banc 2002) (declining to review grandparent visitation statute under strict scrutiny), *citing Troxel v. Granville*, 530 U.S. 57, 73 (2000) (refusing to adopt strict scrutiny).

Put another way, any interest that parents have in their family life "is not absolute." *Myers v. Morris*, 810 F.2d 1437, 1462 (8th Cir. 1987). "The liberty interest in familial relations is limited by the compelling governmental interest in protection of minor children, particularly in circumstances where the protection is considered necessary as against the parents themselves." *Id* (and citations therein). "The State, of course, has a duty of the highest order to protect the interests of minor children, particularly those of tender years." *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)

This duty of the highest order is one that Congress recognized in passing the Adoption and Safe Families Act of 1997, upon which Missouri's and other states' 15-out-of-22 months statutes are based. The federal law certainly does not prohibit the states from considering extended foster care in deciding when to file a petition for termination. *See* Pub. L. 105–89, § 103(a)(3)(E); 111 Stat. 2115, 2118; 42 U.S.C. § 675(5)(E).

A. Other states' 15-out-of-22 statutes have passed constitutional muster.

Against this backdrop, three other state courts – in Indiana, Nebraska and Oklahoma – that have addressed due process challenges to their 15-out-of-22 months statutes have applied a rational basis standard, and upheld the statutes. A fourth state court, in Illinois, struck an analogous statute that included an extra factor, not present here. We will address the various decisions below.

Indiana. The Indiana court of appeals has refused to apply strict scrutiny to Indiana's 15-out-of-22-months statute because the statute does not significantly interfere with family integrity. The Indiana statute merely sets a "benchmark for additional involvement of the judicial process" – the parents of a child placed out of the home for the requisite period of time, "during which they have appeared at a number of hearings on the issue," must appear in court one more time for a determination of the best interests of the child. *Phelps v. Sybinsky*, 736 N.E.2d 809, 817-18 (Ind. App. 5th Dist. 2000).

Indiana's statute is constitutional because it "seeks to facilitate adoptions, instead of endless foster care placements," by setting a "fifteen-month benchmark" at which a petition to terminate parental rights is filed. *Phelps*, 736 N.E.2d at 818; *see also James v. Pike County, Ind., Office of Family & Children*, 759 N.E.2d 1140, 1143 (Ind. App. 1st Dist. 2001). The Court does not "take[ ] lightly" the filing of a petition to terminate parental rights, but the benchmark

> does bear a rational relation to the State's very legitimate interest in promoting adoptions of children who have been removed from their parental homes for extended periods of time. The Indiana statute, with the protections outlined above, does not violate the Due Process Clause.

Phelps, 736 N.E.2d at 818. Among those protections is that after the petition is filed, a hearing must be held to determine whether termination is in the best interests of the chid. *Id*.

Nebraska. Just as the Indiana statute merely provides a "benchmark" for additional judicial involvement, Nebraska's 15-out-of-22 months statute merely provides a "guideline" for the time required for parental rehabilitation. *In re Ty M.*, 655 N.W.2d 672, 692 (Neb. 2003). The statute does not violate due process because "adequate safeguards are provided to ensure that parental rights are not terminated based solely upon the length of time children are in out-of-home placement." *Id*. Among those safeguards is that if the state proves the requisite period of time has expired, the state must also be prove that termination of parental rights is in the best interests of the child. *Id*.

The Nebraska Supreme Court eloquently describes the state's interest, promoted by 15-out-of-22 months statute, in avoiding a wait without end for its children in foster care:

> Children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity. The concept of permanency is not simply a "buzzword," as [the parent] contends, but rather, a recognition that when there is no reasonable expectation that a natural parent will fulfill his or her responsibility to a child, the child should be given an opportunity to live with an adult who has demonstrated a willingness and ability to assume that responsibility *and* has a permanent legal obligation to do so.

In re Sunshine A., 602 N.W.2d 452, 460 (Neb. 1999).

Oklahoma. The "plain purpose" of Oklahoma's 15-out-of-22-months statute "is to protect children from extended foster care." *In re M.C.*, 993 P. 2d 137, 139 (Okla. Civ. App. Div. 2 1999) (statute improperly applied retroactively). But the statute "is not a strict liability statute" because the "defense" that termination is not in the child's best interests remains available to the parent; "termination is permissive, not mandatory." *In re T.M.*, 6 P.3d 1087, 1093 (Okla. Civ. App. Div. 1 2000) (statute not applied retroactively). *See also In re M.J.*, 8 P.3d 936, 939 (Okla. Civ. App. Div. 3 2000) ("We see nothing ... proscribing a parent's presentation of defensive matters otherwise available in proceedings under provisions other than the fifteen-of-twenty-two-month section"). Indeed, Oklahoma has construed its statute to require a showing of culpable parental responsibility for placement in foster care for the requisite period of time. *See In re C.R.T.*, 66 P.3d 1004, 1012 (Okla. Civ. App. Div. 2 2003) ("extended foster care per se does not create a stand alone basis for termination of parental rights").

Illinois. The Illinois supreme court found an Illinois Adoption Act statute unconstitutional. But there, 15-out-of-22 months was more than a trigger for initiating action. That statute created a presumption of parental unfitness based upon the child's being in foster for 15 months out of any 22 month period, rebuttable by the parent showing it is more likely than not it will be in the child's best interests to be returned to the parent within 6 months of the date the termination petition was filed. *See In re H.G.*, 757 N.E.2d 864, 871(Ill. 2001); 750 ILCS 50/1(D)(m-1) (West 1999).

The Indiana, Nebraska, and Oklahoma statutes have no similar provision, and, as shown above, neither does the Missouri statute. In fact, the statute that the Illinois court struck is not Illinois's counterpart to the Indiana, Nebraska, Oklahoma, and Missouri statutes, or for that matter the federal statute. *See* 42 U.S.C. § 675(5)(E). The Illinois statutory requirement of filing a termination petition when a child has been in foster care for 15 out of the most recent 22 months is contained elsewhere – in the Illinois Juvenile Court Act, which states that the children and family services department shall request the state's attorney to file a termination petition if "a minor has been in foster care ... for 15 months of the most recent 22 months." 705 ILCS 405/2-13 (4.5)(a)(i) (West1999). The Illinois Supreme Court was aware of this Juvenile Court Act statute and distinguished it from the constitutionally infirm Adoption Act statute, by holding that the infirm statute, impermissibly, "goes a step further." *In re H.G.*, 757 N.E.2d at 866.

Thus §211.447.2(1) is thus more like statutes that have been upheld as constitutional under the rational basis test in Indiana, Nebraska and Oklahoma, than it is like the Illinois statute that was struck in *H.G.*

B. Missouri's statute is not arbitrary and affords due process.

Williams does not discuss in her brief (and did not draw to the attention of the court below) any non-Missouri courts' decisions reviewing other states' 15-out-of-22 months statutes for compliance with due process. Rather, her due process argument, as far as it goes, sounds in a general complaint of arbitrariness. *E.g.* Appellant's Brief, p. 40.

Of course, the due process guarantee protects individuals from arbitrary acts of the government. *State ex rel. Williams v. Marsh*, 626 S.W.2d 223, 229-230 (Mo. banc 1982). As demonstrated in Section II above, Missouri's two-step statutory procedure for termination

of parental rights, including §211.447.2(1), is not arbitrary. To the contrary, §211.447 is replete with guidelines for the state and the juvenile courts to follow. **Section §211.447.2(1) establishes a statutory benchmark that requires the state to file a petition to terminate. "[R]easonable regulations that do not significantly interfere with [a fundamental right] may legitimately be imposed"; such regulations are not subject to strict scrutiny. *Zablocki v. Redhail,* 434 U.S. 374, 386 (1978).**

And the juvenile court cannot simply stop at the allegations – it must engage in the two-step process of finding statutory grounds for termination by clear, cogent and convincing evidence, and then proceed to a best interests analysis. Even then, the juvenile court is not required to terminate parental rights, it simply may.

Williams nevertheless argues that using a 15-out-of-22 standard is arbitrary, because the passage of time *might* be subject to maneuver by the state and *may* have nothing to do with parental fitness. Appellants' Brief, pp. 41-42. Though Williams argues in this regard about the weight of the evidence, Appellant's Brief, pp. 42-44, the juvenile court's findings were adverse to her argument. The court heard the testimony of Williams' caseworker, among other persons; Williams was present in court and did not testify to contradict the caseworker. In the prior case, no. JU1-00-38J, the same judge had rendered a judgment on September 11, 2001, releasing the state from making further reasonable efforts to return the child to the parents. Williams did not appeal that judgment.

That judgment also adjudicated the child as neglected. Though was only one

ground out of five that the juvenile court found was a statutory basis for the termination, sustaining that – or any one of the five grounds – on appeal is sufficient to affirm the termination. *In the Interest of E.L.B.*, 103 S.W.3d at 776.

Thus whether §211.447.2(1) *might* be applied in an unconstitutional way does not make that constitutional challenge ripe. Speculation never supports ripeness, nor does the probability of an occurrence. *Buechner v. Bond*, 650 S.W.2d 611, 614 (Mo. banc 1983). In the same speculative vein, Williams argues that Missouri's statutory scheme does not comply with the due process requirements set forth in *Santosky v. Kramer*, 455 U.S. 745, 753 (1982), because termination may be permitted without proof of unfitness. Appellant's Brief, p. 38. But the Missouri two-step procedure, as discussed above, does: the first step is proof of unfitness, the second is best interests.

Even if Williams' argument were correct, that does not mean the statute is unconstitutional. "'Where feasible, ... [a] statute will be interpreted to be consistent with the constitution where doubts may be resolved in favor of validity.'" *Blakely*, 83 S.W.3d at 541, *quoting Silcox v. Silcox*, 6 S.W.3d 899, 903 (Mo. banc 1999). Missouri courts do not treat even the "presum[ption]" of unfitness found in §211.447.4(6) (parental rights to one or more other children terminated within past three years) as unrebuttable. *In the Interest of C.C.*, 32 S.W.3d 824, 82830 (Mo. App. WD 2000). And there is no reason that Missouri, like Oklahoma, *In re C.R.T.*, 66 P.3d at 1012, cannot

construe its statute to require parental responsibility for the child's being in foster care the requisite period of time. Williams, in fact, suggested below that a time frame should be associated with parental culpability. SLF6 (arguing that parents should not be terminated on basis of 15-out-of-22 "without showing neglect or abuse by" the parent); SLF10 (arguing that parental rights could not be terminated on basis of 15-out-of-22 without showing that parent "had done [something] to harm the child"). And, the juvenile court's findings here did demonstrate Williams' responsibility for the child's time spent in foster care. *E.g.* LF3, App. A-2 (finding abandonment); LF 32, App. A-4 (lack of support); LF 32, App. A-5 (in jurisdiction of juvenile court for one year, lack of interest); and LF 33, App. A-6 (lack of involvement). Therefore, Williams' argument fails.

Conclusion

Because the constitutional issue in this case is merely colorable, the Court should transfer the case to the Court of Appeals. If the Court does not, it should affirm the decision of the juvenile court.

Respectfully submitted,

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Certification of Service and of Compliance with Rule 84.06(b) and (c)

The undersigned hereby certifies that on this 24th day of September, 2003, one true and correct copy of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid, to:

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains 5,413 words.

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Alana M. Barragán-Scott

APPENDIX

APPENDIX INDEX

Partial outline of Judgment: statutory criteria and findings (LF 30 -36)

iteria recited in judgment	court's finding	statutory counterpart
nformation available to juvenile officer or the vision establishes that the child has been in foster re for at least fifteen of the most recent twenty-o months[.]" (LF 30)	"The Court finds that the child was born on August 24, 2000, and has been in foster care his entire life, which exceeds 15 of the last 22 months." (LF 30)	§211.447.2(1
A court of competent jurisdiction has determined e child to be an abandoned infant. The court may d that an infant has been abandoned if: The parent s, without good cause, left the child without any ovision for parental support and without making rangement to visit or communicate with the ild, although able to do so[.]" (LF 30)	"The Court finds that the mother ... [has] abandoned the child, in that [she] has, without good cause, left the child without any provision for parental support and without making arrangements to visit or communicate with the child, although able to do so. As to Mother – the Court finds that she has provided no financial support, no gifts, no clothing, NOTHING. During much of the child's life, mother has been incarcerated, but was living in St. Louis for a period of time and was employed – but even when employed, mother did not make even token attempts to provide for this child. However, Mother did send $200 to the child's alleged father while he was in prison. Mother has provided no care or control to assist the child's physical, mental or emotional health and development...." (LF 31) (emphasis in original)	§211.447.2(2 or §211.447.4(1

iteria recited in judgment	court's finding	statutory counterpart
The child has been abused or neglected." (LF 31)	The Court adjudicated that the child had been abused or neglected on November 21, 2000 in case number JU100-38J. (LF 31)	§211.447.4(2
n determining whether to terminate parental ghts pursuant to this subdivision, the court shall nsider and make findings on the following nditions or acts of the parent:" (LF 31)		§211.447.4(2
"(a) A mental condition which is shown by competent evidence either to be permanent or such that there is no reasonable likelihood that the condition can be reversed and which renders the parent unable to knowingly provide the child the necessary care, custody and control;" (LF 31)	"(a) The Court finds there were no allegations concerning such conditions in the parents, and no evidence on this issue. The Court finds that neither parent has such a mental condition." (LF 31)	§211.447.4(2
"(b) Chemical dependency which prevents the parent from consistently providing the necessary care, custody and control of the child and which cannot be treated so as to enable the parent to consistently provide such care, custody and control;" (LF 31)	"(b) The Court finds there were no allegations concerning such conditions in the parents, and no evidence on this issue. The Court finds that neither parent has such a chemical dependency problem." (LF 31)	§211.447.4(2
"(c) A severe act or recurrent acts of physical, emotional or sexual abuse toward the child or any child in the family by the parent, including an act of incest, or by	"(c) The Court finds there were no allegations concerning such acts by the parents, and no evidence on this issue. The Court finds that neither parent has committed such acts. The	§211.447.4(2

iteria recited in judgment	court's finding	statutory counterpart
another under circumstances that indicate that the parent knew or should have known that such acts were being committed toward the child or any child in the family; or" (LF 31)	child has been in foster care since birth." (LF 31)	
"(d) Repeated or continuous failure by the parent, although physically or financially able, to provide the child with adequate food, clothing, shelter, or education as defined by law, or other care and control necessary for the child's physical, mental, or emotional health and development;" (LF 32)	"(d) As to Mother – the Court finds she has provided no financial support, no gifts, no clothing, NOTHING. During much of the child's life, mother has been incarcerated, but was living in St. Louis for a period of time and was employed – but even when employed, mother did not make even token attempts to provide for this child. However, Mother did send $200 to the child's alleged father while he was in prison. Mother has provided no care or control to assist the child's physical, mental or emotional health and development." (LF 32) (emphasis in original)	§211.447.4(2
he child has been under the jurisdiction of the venile court for a period of one year, and the urt finds that the conditions which led to the sumption of jurisdiction still persist, or nditions of a potentially harmful nature continue exist, that there is little likelihood that those nditions will be remedied at an early date so that	"As to the mother, at the time the Court assumed jurisdiction, mother was incarcerated by the Department of Corrections and therefore unable to provide for the child. The child has been under the Court's jurisdiction since birth (8/24/00). Mother is once again a resident of the Department of Corrections (DOC). Upon	§211.447.4(3

iteria recited in judgment	court's finding	statutory counterpart
e child can be returned to the parent in the near ture, or the continuation of the parent-child lationship greatly diminishes the child's ospects for early integration into a stable and rmanent home." (LF 32)	release from DOC, mother moved to the St. Louis area. DFS unsuccessfully attempted to find a placement for the child in that area. Mother offered the names of no relatives who might be considered as placement options. Mother has made no contact with DFS since June of 2002, has failed to notify DFS of her changes of address and has not asked for a visit with the child in over one year (last request was February 11, 2002). Mother's demonstrated lack of interest in the child and current incarceration makes it clear that there is little likelihood that she will remedy her condition at an early date to make it possible to return the child to her in the near future. Continuing the parent-child relationship greatly diminishes the child's prospects for adoption in a suitable home." (LF 32)	
n determining whether to terminate parental ghts, the court shall consider and make findings the following:" (LF 33)		§211.447.4(3
"The terms of a social service plan entered into by the parent and the division and the extent to which the parties have made progress in complying with those terms."	"As to the mother: upon her release from prison, mother moved to the St. Louis area. She was to maintain contact with DFS and told she could call collect – she did NOT contact DFS	§211.447.4(3

iteria recited in judgment	court's finding	statutory counterpart
(LF 33)	**twice per month as agreed. She did not notify DFS of address changes and did not abide by the terms of her probation (this is obvious, since she has been returned to prison). She did not visit her child once a month and did not send cards or letters. She did not attend or participate in all DFS meetings and court hearings on this child...." (LF 33) (emphasis in original)**	
"The success or failure of the efforts of the juvenile officer, the division or other agency to aid the parent on a continuing basis in adjusting his circumstances or conduct to provide a proper home for the child." (LF 33)	**"As to both parents – the juvenile officer and DFS have failed to aid either parent on a continuing basis to adjust their circumstances or conduct to provide a proper home for the child. Mother is back in prison, alleged father has tested positive for drug use and his parole officer is attempting to revoke his parole...." (LF 33)**	**§211.447.4(3**
"A mental condition which is shown by competent evidence either to be permanent or such that there is no reasonable likelihood that the condition can be reversed and which renders the parent unable to knowingly provide the child the necessary care, custody and control." (LF 33-34)	**"As to both parents, there is no allegation and no evidence concerning their mental conditions. The Court must therefore find that no such condition exists." (LF 34)**	**§211.447.4(3**
"Chemical dependency which prevents the parents from consistently providing the	**"While there is some evidence that both parents suffer from chemical dependency issues, there is**	**§211.447.4(3**

iteria recited in judgment	court's finding	statutory counterpart
necessary care, custody and control over the child and which cannot be treated so as to enable the parent to consistently provide such care, custody and control; or" (LF 34)	no allegation in the pleadings or evidence offered on this issue. The Court therefore finds there is no evidence that either parent suffers from a chemical dependency that would prevent them from serving as a suitable parent for this child." (LF 34)	
The parent has been found guilty or pled guilty to felony violation of chapter 566, RSMo, when the ild or any child in the family was a victim, or a olation of section 568.020, RSMo, when the child any child in the family was a victim. As used in is subdivision, a "child" means any person who as under eighteen years of age at the time of the ime and who resided with such parent or was lated within the third degree of consanguinity or finity to such parent; or" (LF 34) (emphasis in iginal)	"There is no allegation or evidence that either parent has been convicted of violation of Chapter 566. The Court finds neither parent has been convicted of violating Chapter 566." (LF 34)	§211.447.4(4
The child was conceived and born as a result of an t of forcible rape. When the biological father has ed guilty to, or is convicted of, the forcible rape the birth mother, such a plea or conviction shall conclusive evidence supporting the termination the biological father's parental rights; or" (LF)	"There is no allegation or evidence that the alleged father raped mother and the Court finds this ground does not exist as a basis for terminating the alleged father's rights." (LF 34)	§211.447.4(5

iteria recited in judgment	court's finding	statutory counterpart
The parent is unfit to be a party to the parent and ild relationship because of a consistent pattern of mmitting a specific abuse, including but not nited to, abuses as defined in section 455.010, SMo, child abuse or drug abuse before the child of specific conditions directly relating to the rent and child relationship either of which are termined by the court to be of a duration or ture that renders the parent unable, for the asonably foreseeable future, to care appropriately r the ongoing physical, mental or emotional needs the child." (LF 34) (emphasis in original)	"The Court finds that neither parent has abused this child. This is based on the fact that the father has never even SEEN the child. Mother has seen the child, but there is no allegation or evidence of any abuse of the child by mother." (LF 34) (emphasis in original)	§211.447.4(6
t is presumed that a parent is unfit to be a party to e parent-child relationship upon a showing that thin a three-year period immediately prior to the rmination adjudication, the parent's parental ghts to one or more other children were voluntarily terminated pursuant to subsection 2 3 of this section or subdivisions (1), (2), (3) or) of subsection 4 of this section or similar laws of her states." (LF 34)	"The Court finds that her parental rights were involuntarily terminated on FOUR of her children by the Circuit Court of the City of St. Louis. The parental rights of the alleged father have been involuntarily terminated on TWO of his children by the Circuit Court of the City of St. Louis. Since the unknown father is unknown, there is no way to know if his rights have been involuntarily terminated. The Court finds that the parents are unfit." (LF 35) (emphasis in original)	§211.447.4(6
The court shall evaluate and make findings on the llowing factors, when appropriate and applicable		§211.447.6(1

iteria recited in judgment	court's finding	statutory counterpart
the case:" (LF 35)		
"(1) The emotional ties to the birth parent;" (LF 35)	"The Court finds the child has no emotional ties to mother or father. Child has never seen father, and has not seen mother in over one year." (LF 35)	§211.447.6(4
"(2) The extent to which the parent has maintained regular visitation or other contact with the child;" (LF 35)	"The mother has not maintained regular visitation or contact with the child. The most regular contact took place during mother's incarceration at the time of the child's birth. The foster parents took the child to the prison for visits. Since mother was released from prison, she has had virtually no contact with the child. Mother did not go to Columbia when the child had surgery and didn't even bother to inquire about the outcome for several months..." (LF 35)	§211.447.6(2
"(3) The extent of payment by the parent for the cost of care and maintenance of the child when financially able to do so including the time that the child is in the custody of the division or other child-placing agency;" (LF 35)	"Neither parent has made ANY payment for care and maintenance of the child, although the evidence indicated that mother sent money to the alleged father while he was incarcerated." (LF 35) (emphasis in original)	§211.447.6(3
"(4) Whether additional services would be	"There was no evidence presented of ANY	§211.447.6(4

iteria recited in judgment	court's finding	statutory counterpart
likely to bring about lasting parental adjustment enabling a return of the child to the parent within an ascertainable period of time;" (LF 35)	**services available that would bring about lasting parental adjustment to allow the child to be placed with either parent within an ascertainable period of time. The Court notes that services were offered and rejected (or ignored) by both parents." (LF 35) (emphasis in original)**	
"(5) The parent's disinterest in or lack of commitment to the child;" (LF 35)	**"This Court finds that actions speak much louder than words. Mother's lack of commitment is evidenced by her failure to visit the child while out of prison, failure to even inquire about the child, failure to make even token support payments..." (LF 35)**	**§211.447.6(5**
"(6) The conviction of the parent of a felony offense that the court finds is of such a nature that the child will be deprived of a stable home for a period of years; provided, however, that incarceration in and of itself shall not be grounds for termination of parental rights:" (LF 36)	**"The Court notes that mother is back in prison, but there is no evidence of how long she will be incarcerated on this current placement. The Court notes that when mother was out of prison, she was unable to offer a stable home for the child." (LF 36)**	**§211.447.6(6**
"(7) Deliberate acts of the parent or acts of another of which the parent knew or should have known that subjects the child to a substantial risk of physical or mental harm." (LF 36)	**"The Court finds there have been no acts by anyone that subject the child to a risk of harm; the child has been in foster care since birth." (LF 36)**	**§211.447.6(7**

iteria recited in judgment	court's finding	statutory counterpart
The court may attach little or no weight to frequent visitations, communications, or ntributions. It is irrelevant in a termination oceeding that the maintenance of the parent-child lationship may serve as an inducement for the arent's rehabilitation." (LF 36)	"This Court DOES attach weight to infrequent visitations, communications or contributions. A person who WANTS to be a parent will visit as frequently as possible, will communicate regularly and will make at least token financial contributions toward support. People who do NOT intend to act as a parent behave like the mother and father in this case." (LF 36) (emphasis in original)	§211.447.7
	"The Court finds that the best interests of this child requires that the parental rights of the mother, alleged father and unknown father be terminated...." (LF 36)	§211.447.5